

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 49/94

In the matter between:

ALBERT NTSHANGASE Applicant

And

SWAZILAND BREWERIES LIMITED Respondent

CORAM:

MARTIN BANDA : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

REGINALD DHLADHLA : FOR THE APPLICANT

JOB MPELE : FOR THE RESPONDENT

JUDGEMENT

The Applicant seeks compensation for his unfair dismissal by the Respondent from his employment.

It is common cause that the Applicant was employed by the Respondent on the 4th of February, 1974 as a Truck Conductor until 1990 and from that date to the 6th November, 1992 when he was dismissed. At the time of his dismissal the Applicant was earning a weekly income of E175.00. Upon his dismissal the Applicant was paid a sum of E3107.28.

The Applicant testified and stated that he is 48 years of age. He is married and has two wives. He has 9 children. 7 of the children are at school, one is still a toddler and

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the other one completed school in 1994. The Applicant is unemployed. The Applicant stated that he was employed by the Respondent SWAZILAND BREWERIES LIMITED in March, 1974 as a Truck Conductor. He earned E175.00 per week.

One lunch hour the Applicant was accused by a fellow employee MUSA MASUKU who was a forklift driver, of being a spy that he was spying on the other employees. As the Applicant was seated having his lunch, MUSA MASUKU hit him with an open hand across the face accusing him of being a spy. MUSA MASUKU then took a table knife and stabbed the Applicant on the left arm. The Applicant then dispossessed MUSA MASUKU of the knife and acting in self defence went on to stab him with the same knife. Immediately after the fight the Applicant left the Respondent's premises and was driven to Nhlanguano Government hospital by one SIMELANE who the Applicant knew as he used to deliver some beer orders from the Respondent at his family's bottle store in Nhlanguano. The Applicant does not know the first name of this SIMELANE.

The Applicant stated that he did not go to the Raleigh Fitkin Memorial Hospital because he was bleeding and it was felt that the queues at Raleigh Fitkin Memorial Hospital were too long. The Applicant stated that he was stitched at the hospital. The fight took place around 12 p.m. The matter was not taken before a criminal court. The Applicant was dismissed from employment on the ground that he retaliated and assaulted the employee who had first assaulted him. MR. LUTFO DLAMINI the Personnel Manager and MR. DUPLESSIS the General Manager informed the Applicant of his

dismissal.

The Applicant stated that since he was employed by the Respondent he was never reprimanded nor suspended for any misconduct. The Applicant admitted that a sum of E3107.28 was paid to him representing notice. It is the Applicant's

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case that he was unfairly dismissed and claims 6 months wages as compensation. The Applicant stated that before his dismissal management through MR. LUTFO DLAMINI and MR. DUPLESSIS asked someone by the name JOHANNES DLAMINI to come and listen to the proceedings but he was never asked by the Applicant to represent him.

Under cross examination the Applicant stated that there was no disciplinary hearing before he was dismissed and minutes were taken at the hearing. The Applicant stated that he stabbed MUSA MASUKU two times in self defence. After the Applicant had dispossessed MUSA MASUKU of the knife he stabbed him once. MUSA MASUKU started kicking the Applicant and grabbing his shirt, locking the door way when the Applicant wanted to run out and could not let him free and kept on grabbing him. The Applicant stabbed MUSA MASUKU the second time. After the fight MUSA MASUKU WAS bleeding just like the Applicant.

Responding to questions from the Court the Applicant stated that MUSA MASUKU was not called to testify before the disciplinary hearing. The Applicant was convicted by the disciplinary hearing without the evidence of MUSA MASUKU. The Applicant stated that he told the disciplinary hearing that it was MUSA MASUKU who accused him of being a spy and who assaulted him first. The Applicant stated that there were no witnesses called before the disciplinary hearing.

The Respondent then lead the evidence of DW1 AMOS DLAMINI a driver. DW1 stated that he knows the Applicant. He was employed by the Respondent and was dismissed for having been engaged in a fight with another employee at the Respondent's premises. DW1 witnessed the fight. DW1 stated that it was during lunch hour as they were having their meals in the staff canteen. The Applicant and MUSA MASUKU occupied a table next to the one that DW1 was occupying. The Applicant and MASUKU exchanged some words but DW1 could not pick them up though

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it was obvious that they had a hot argument. The Applicant ALBERT NTSHANGASE then left the table and walked to another one. MASUKU followed the Applicant. MASUKU pushed the table to the Applicant. That was the beginning of the quarrel. DW1 then advised them to stop and told them that they might be dismissed from work if they continued fighting one another. MASUKU kept on talking and did not want to move away from the table. DW1 then asked what the matter was between them. MASUKU told DW1 that the Applicant was Management's spy. They kept on exchanging words. DW1 went back to his table. MASUKU then slapped the Applicant. The Applicant stood up to retaliate but DW1 was quick enough to come and separate them. While DW1 was trying to separate them MASUKU took a table knife and stabbed the Applicant on the arm next to the shoulder. DW1 then grabbed MASUKU as he was the one who seemed to be more violent. DW1 then separated them.

Applicant persistently asked MASUKU why he was assaulting him. They went on exchanging words DW1 does not know whether the Applicant sustained an injury during the stabbing but he did not see any blood. After that, Applicant went to the area where the staff lockers are and came back and found that MASUKU was still around and continued to ask for the reason why he was being assaulted. At this stage MASUKU did not answer but walked out. He was with another employee but DW1 has forgotten who it was.

The Applicant went out and within some few minutes MASUKU came back to the staff canteen with a stab wound on the chest and one at the back. DW1 went out to try and look for the Applicant and saw him walking quickly towards the exit gate and did not talk to him. After that he helped to convey MASUKU to hospital as he was bleeding. DW1 stated that he did not see the Applicant bleeding after he had been stabbed up to the time he saw him walking out of the gate. This was a period of approximately 5 to 6 minutes.

Under cross examination DW1 stated that MASUKU followed the Applicant when the Applicant left the table where they had been sitting to occupy another one. The Applicant asked MASUKU why he was following him. MASUKU then pushed the table onto the Applicant. At this time MASUKU was carrying a table knife. DW1 said first MASUKU pushed the table towards the Applicant. When the Applicant stood MASUKU slapped him. DW1 ran to separate them. During the course of the separation MASUKU went on to stab the Applicant with a table knife. MASUKU then walked out of the canteen. DW1 did not follow him. DW1 did not witness what transpired outside. DW1 was not called as a witness to the disciplinary hearing conducted by the Respondent. DW1 does not know how MASUKU sustained his injuries.

The Respondent then lead the evidence of DW2 LUTFO DLAMINI the Marketing Manager of the Respondent. DW2 stated that the Applicant was dismissed after a disciplinary hearing which found him guilty of stabbing another employee one MASUKU. the Chairman of the disciplinary hearing was MR. VINCENT MANYATSI. The role of DW2 in the disciplinary hearing was to ensure procedural fairness and to record the proceedings.

There was no cross examination of DW2. Responding to questions from the Court DW2 stated that the Applicant had worked for 17 years for the Respondent and that during that time he had no disciplinary case of this nature.

The Applicant said no witnesses were called before the disciplinary hearing conducted by the Respondent. DW1 said he was not called to testify before the disciplinary hearing conducted by the Respondent. DW2 stated that the people who were present during the hearing were the Chairman MR. MANYATSI, the Human Resources Manager MR. LUTFO DLAMINI, the Management representative MR. PARKS DLAMINI, the accused MR. ALBERT NTSHANGASE, the accused's representative MR. DLAMINI and the observer MR. MPELE. DW2 does not give names of witnesses that testified before the disciplinary hearing.

DW1 and DW2 did not testify before the disciplinary hearing. MUSA MASUKU the Applicant's assailant was not called to testify before the disciplinary hearing. Our duty is to evaluate the evidence that was placed before the Respondent during the disciplinary hearing that it conducted. The witnesses if any that testified before the disciplinary hearing were not lead in evidence before Court. The witnesses that testified before Court did not testify before the disciplinary hearing. The Applicant says no witness was heard before the disciplinary hearing. DW2 said the Chairman of the disciplinary hearing was MR. VINCENT MANYATSI, the Management representative was MR. PARKS DLAMINI, the Human Resources representative was himself LUTFO DLAMINI, the union representative was MR. PATRICK NXUMALO, the Defendant's representative was MR. JOHAN DLAMINI and the Defendant was the Applicant ALBERT NTSHANGASE.

The parties in this matter stated that the evidence is not in dispute in fact it is agreed. The evidence that has been agreed shows that one MUSA MASUKU accused the Applicant of being a Management spy. The Applicant then left the table which he had been sharing with MUSA MASUKU and went to occupy another table. MUSA MASUKU followed him. Applicant asked MUSA MASUKU why he was following him. MUSA MASUKU then pushed the table against the Applicant. The Applicant stood up . MUSA MASUKU slapped the Applicant across the face with his open hand. DW1 AMOS DLAMINI then separated them. MUSA MASUKU took a table knife and stabbed the Applicant. The Applicant dispossessed MUSA MASUKU of the table knife and stabbed him in turn, once. MUSA MASUKU started kicking the Applicant, grabbing his shirt, locking the door way when the Applicant wanted to run out and could not let him free and kept on grabbing him. The Applicant stabbed MUSA MASUKU the second time.

From this evidence could the Applicant be taken to have threatened another employee, or attacked and fought another

employee with a dangerous weapon. The evidence which we have referred to which was heard before Court shows that the Applicant was cool and collected when MUSA MASUKU called him a Management spy. The Applicant walked away from his aggressor to occupy a different table. He was followed and slapped and then stabbed. The Applicant says he dispossessed MUSA MASUKU of the table knife and stabbed MUSA MASUKU in self defence. DW1 does not contradict the evidence of the Applicant on this point as he was not present. DW1 was only present when the Applicant was stabbed. In any event the evidence is agreed and it is not in dispute therefore what the Applicant has outlined as the sequence of events leading to the stabbing of MUSA MASUKU is not in dispute. Does this evidence show that the Applicant threatened a fellow employee, attacked and fought another employee with a dangerous weapon.

The evidence before Court shows the Applicant under unrelenting attack from MUSA MASUKU who despite the intervention of DW1 did not let off until he stabbed the Applicant. We are unable to see the threat from the Applicant to another employee. What we see is an employee who has been on the receiving end of a vicious attack protecting himself, defending himself from aggressor or attacker. That is the evidence we have before Court. The Applicant neutralising his attacker who was kicking him, grabbing his shirt, locking the door making it impossible for the Applicant to escape. Faced with this evidence, and there is no suggestion that there was any other evidence before the disciplinary hearing, was it proper for the disciplinary hearing to hold that the Applicant had attacked and fought another employee with a dangerous weapon and threatened an employee of the Respondent.

The conclusion is not borne out by the evidence. Can it then be said that the Respondent took all the circumstances of this case into account before terminating the services of the Applicant. Here was an employee who had served the Respondent for 17 years without being the subject of a disciplinary hearing. Here was an employee who was the victim

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of an attack. Moving away from his aggressor, pursued by his aggressor and stabbed and assaulted. We do not have the picture of an employee attacking and fighting another with a dangerous weapon but one defending one self under attack.

We are not by any stretch of imagination supporting violence and fighting at the work places. We are saying the merits of the case should be looked at reasonably. In the present case we are unable to see the ingredients of an employee freely willingly and by consent engaging in act or acts of violence or attacking another by choice as a deliberate act of intent to perform but rather forced by circumstances and to protect oneself. It is our decision and judgement that the Respondent failed to take all these circumstances that were present in this case into account. Taking all the circumstances that were before it the Respondent failed or unreasonable decided in the face of the circumstances to terminate the services of the Applicant. The charge of attacking and fighting another employee with a dangerous weapon had not in our view been proved. It is our judgement that the termination of the Applicant's services in these circumstances was not reasonable, it was not fair.

We order that the Respondent do pay to the Applicant the following terminal benefits :

- (a) One month wages in lieu of notice E 703.00
- (b) Severance Allowance E5975.50
- (c) Leave Pay E 703.00
- (d) Additional Notice E2390.20

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Less the sum of E3107.28 which has already been paid out to the Applicant.

We are also satisfied that the Applicant has complied with Section 13 (3) of the Industrial Relations Act of 1980. It is ordered that the Respondent do pay to the Applicant 6 months wages by way of compensation in the sum of E4218.00.

The Members have concurred.

MARTIN SAMSON BANDA

PRESIDENT - INDUSTRIAL COURT